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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PROTECT OUR INDIAN RIVER, an unincorporated association, LARRY V. HAWKINS, WILLIAM L. GARDNER, and DIANE M. DALY,	:	No. 406, 2015
Appellants/Petitioners-Below,	:	
v.	:	Trial Court Below: Superior Court of the State of Delaware In and For Sussex County C.A. No. S13A-12-002 RFS
SUSSEX COUNTY BOARD OF ADJUSTMENT, ALLEN HARIM FOODS, LLC, a Delaware limited liability company, and PINNACLE FOODS CORPORATION a Delaware corporation,	:	
Appellees/Respondents-Below.	:	

APPELLANTS' REPLY BRIEF

ABBOTT LAW FIRM

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Dated: October 30, 2015

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ARGUMENT

I. SINCE THERE WAS NO "PROPERTY OWNER" OR "APPEAL" BEFORE THE BOARD, IT LACKED JURISDICTION

A. Harim Was Not The "Property Owner" & Therefore No Board Jurisdiction Existed

Harim argues that it was permitted to pursue a direct application for a special exception to the Board on the grounds that it constitutes an "equitable owner" of the Property. AB at 14-15.[1] The two fatal defects with its argument, however, are: 1) no Record evidence establishes that Harim had the Property under contract; and 2) the common and ordinary meaning of the term "property owner" is the legal title owner, not a buyer. Thus, Harim's argument must fail.

1. The Record Is Devoid Of "Equitable Owner" Proof

The Record on appeal before the Court was closed when the Board voted to approve the Special Exception on September 23, 2013 (as memorialized in the written decision issued on November 5, 2013). Nothing in the Record proves that Harim had a contract to buy the Property from Pinnacle.

Harim's attempt to shoehorn supra-Record information into the court proceedings should be rejected on the grounds that it is not permitted under the

[1] References herein to "AB at __" are to "Appellee Allen Harim Foods, LLC's Answering Brief" dated October 15, 2015.

standard of review established by 9 *Del. C.* § 6918. While § 6918(e) permits the Superior Court to take additional evidence through a formal fact-finding procedure, that did not occur. Consequently, any extra-Record evidence attempted to be wedged into this appeal cannot be considered by the Court, thereby eliminating the possibility that it could be shown that Harim constitutes an "equitable owner" of the Property.

The only record evidence that Harim was under contract to purchase the Property was a statement in Harim's special use exception application: "Contract of Purchase and Sale, March 14, 2013." A-84. But Equitable Conversion does not occur until all contingencies to the contract are satisfied or waived. *Jacobs v. Great Pacific Century Corp.* 484 A.2d 1312, 1314 (N.J. Super. 1984). *See also Eddington v. Turner, infra.* At 742 (equitable conversion does not occur until contingency does). No record evidence established that all conditions of sale had been met so that an Equitable Conversion occurred. As a consequence, Harim was not shown to have any equitable interest in the Property in 2013, thereby precluding it from qualifying as a "property owner" even under its own Equitable Conversion theory.

2. "Property Owner" Means Legal Title Owner

Additionally, the statute unambiguously provides that an appeal to the Board for a Special Exception may only be initiated by a Sussex County agent or agency

or by the "property owner." 9 *Del. C.* § 6916(a). And Harim is neither. It is clearly not a Sussex County agent/agency. Nor is it the "property owner."

First, § 6916(a) does not expressly indicate that the "property owner" may include the "equitable owner." *Second*, the term "property owner" is not defined by statute. *Third*, the common and ordinary meaning of the terms are: a) property: "something that is or may be owned or possessed; a piece of real estate"; and b) owner: "one that has the legal or rightful title whether the possessor or not." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1818 and 1612, respectively.[2] As a result, the statutory term "property owner" means the legal title owner of the Property: Pinnacle, not Harim.

The conclusion does not change even under the County Code provision relied upon by Harim: § 115-208A. AB at 14. Although §§ 6916 and 6917 must prevail in case of any inconsistency with the County Code based upon § 6915 (requiring Sussex County provisions to be consistent with the Subchapter I), the plain meaning of County Code § 115-208A leads to the same inexorable conclusion: "property owner" is the legal title owner, Pinnacle. As a consequence, the Board's decision should be invalidated on the grounds that it lacked jurisdiction.

[2] The Courts of this State have regularly relied upon dictionaries to define undefined statutory terms, in order to evince the common and ordinary meaning of words contained in a statute as required by the Plain Meaning Rule. *Angstadt v. Red Clay Consolidated School Dist.*, 4 A.3d 382, 390 (Del. 2010).

3. Equitable Conversion Does Not Impact Legal Title

Next, Harim's argument that an "equitable owner" constitutes a "property owner" also fails. Harim asserts that an equitable owner constitutes a "property owner" pursuant to the Doctrine of Equitable Conversion, which it alleges transfers "equitable title." AB at 15. But the execution of a contract for the sale of real estate only transfers the seller's *equitable* interest in the land to the purchaser; legal title remains vested in the seller. *Lawyers Title Ins. Corp. v. Wolhar & Gill, P.A.*, 575 A.2d 1148, 1153, n.2 (Del. 1990).

In *Eddington v. Turner*, 38 A.2d 738, 739-40 (Del. 1944), this Court held that the Doctrine of Equitable Conversion constitutes "a legal fiction based upon the presumed intent of the parties, and embodying the equitable maxim that equity considers that to have been done which should have been done." In addition, the Court held that upon conversion "[e]quity thereafter considers the vendor as holding the land subject to the call of the vendee, and as security for the payment of the purchase price, and considers the vendee as holding the purchase price for the vendor." *Id.* As a creature of equity, the Doctrine of Equitable Conversion cannot modify the legal title owner of the property, which constitutes the definition of the term "property owner." Therefore, Harim cannot, as fictional owner, constitute the actual "property owner" as a matter of law.

B. The Board Is Only Authorized To Consider "Appeals," Not Direct Applications

Harim contends that a direct application to the Board for special exceptions is permissible because: 1) the County Code so provides; and 2) 9 *Del. C.* § 6915 permits Board jurisdiction to be determined as Sussex County sees fit. AB at 16-19. In effect, Harim contends that the County Code may directly conflict with and supersede the pre-eminent State Code delegation of authority to establish a Board and provide for purely appellate jurisdiction. Obviously, Harim's position is untenable as a matter of law.

1. State Code Provisions Trump The County Code

It is well settled that a County's powers in the field of zoning are derived from a delegation by the General Assembly pursuant to State statute. *Save Our County, Inc. v. New Castle County*, 2013 WL 2664187, *5, Glasscock, V.C. (Del. Ch., June 11, 2013), aff'd, *Barley Mill, LLC v. Save Our County, Inc.*, 89 A.3d 51, (Del. 2014)(en Banc), citing *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1276 (Del. 1989). Therefore, such zoning power may only be exercised in accordance with the terms of its delegation. *Id.* and *BC Dev. Assocs.* at 1275 ("[I]t is axiomatic that delegated power may be exercised only in accordance with the terms of its delegation"). The express terms of State statutes delegating the authority may not be violated. *See Farmers For Fairness v. Kent County*, 940 A.2d 947, 956,

n.43 (Del. Ch. 2008)("[W]hen one legislative body having superior authority – such as the General Assembly – has required that another legislative body – such as the Kent County Levy Court – follow certain procedures, the Court must do its duty and enforce the requirements imposed on the latter's lawmaking authority.").

To the extent that the County Code may be read to expand the jurisdiction of the Board beyond consideration of "appeals," the County Code is unenforceable based upon its direct contravention of express statutory terms contained in §§ 6916 and 6917. As a result, the Board was not vested with jurisdiction to entertain Harim's non-appeal application and reversal is therefore warranted.

2. Authority To Adopt General Rules Does Not Supersede Specific Board Jurisdiction Limits

Harim contends that the delegation of authority for Sussex County to adopt "general rules to govern the organization, procedure, and jurisdiction of the Board" under 9 *Del. C.* § 6915 permits the Board to be provided with jurisdiction beyond mere "appeals" as provided for in 9 *Del. C.* §§ 6916 and 6917. AB at 17-18. Not so. Indeed, § 6915 expressly forecloses such a possibility: the "rules shall not be inconsistent with this subchapter... ." (emphasis added) (referring to Subchapter I, Chapter 69, Title 9 of the Delaware Code). Since Subchapter I expressly limits the Board's jurisdiction to "appeals" in §§ 6916 and 6917, the County's adoption of provisions which purport to expand the Board's jurisdiction is an invalid *ultra vires* act.

3. General Home Rule Authority Statutes Do Not Supersede Specific Delegation of Board Jurisdiction Limited to "Appeals"

Next, Harim asserts that the general home rule authority granted to Sussex County pursuant to 9 *Del. C.* § 7001(a) and (b) permits the jurisdiction of the Board to be established in a broader fashion than simply "appeals" as limited by §§6916 an 6917. AB at 18-19. But Harim concedes that the zoning functions were "explicitly" delegated by the General Assembly to Sussex County pursuant to 9 *Del. C.* Ch. 69. AB at 19. It is well settled that a specific statute prevails over a more general one. *Turnbull v. Fink*, 668 A.2d 1370, 1377 (Del. 1995)("the specific statute must prevail over the general."). As a result, §§ 6916 and 6917 prevail over § 7002, thereby expressly limiting the Board's jurisdiction to "appeals."

It has previously been held that a County's legislative enactment will be characterized as a zoning regulation, rather than a mere administrative matter addressed under the general police power, where the legislation substantively affects a change on zoning matters. *Upfront Enterprises, LLC v. Kent County Levy Court*, 2007 WL 1862709, *4, Noble, V.C. (Del. Ch., June 20, 2007). In that decision, the Court rejected the County's argument that a moratorium on the filing of development plans was enacted pursuant to its general Home Rule statutory provision, 9 *Del. C.* § 4110. Section 4110 is the Kent County equivalent of Sussex County's Home Rule provision contained at 9 *Del. C.* § 7001. Since the Board's powers are properly

characterized as zoning in nature, *Upfront* teaches that its actions must be deemed subject to Chapter 69 zoning provisions, not § 7001 Home Rule authority.

4. The General Assembly's Intent To Only Vest The Board With Jurisdiction Over "Appeals" Is Evident From Similar Code Provisions

In direct contradistinction to the statutory language vesting the Board with jurisdiction solely over "appeals," the New Castle County Board of Adjustment is empowered to hear direct applications for special exceptions. Specifically, 9 *Del. C.* §1313(a)(2) provides:

> The Board Adjustment shall be empowered to hear and decide:
>
> > ...Applications for special exceptions or special permits or other special questions in accordance with any zoning ordinance, code or regulation... (emphasis added).

If the General Assembly had intended to give the Board jurisdiction over the direct "applications" then it would have expressly so provided. Since it did not, however, it intended the Board's jurisdiction to be limited to "appeals."

With respect to municipal Boards of Adjustment, there is at least some plausible argument that a direct application for a special exception could be made. Although 22 *Del. C.* § 324 through §326 all include the words "appeal" or "appeals," 22 *Del. C.* § 327(a)(2) provides that "the Board of Adjustment may...Hear and decide special exceptions to the terms of the ordinance upon which the Board is required to pass under such ordinance." So while the preceding statutory sections

would appear to limit a municipal Board of Adjustment to hearing "appeals," the more specific jurisdictional section may grant jurisdiction over direct applications for special exceptions. In contrast, all statutory sections applicable to the Board expressly provide that it is only empowered to consider "appeals." As a result, the Board clearly lacked jurisdiction over Harim's direct application and the Court should therefore invalidate the Board Decision.

ARGUMENT

II. THE BOARD FAILED TO CONSULT WITH NUMEROUS AGENCIES AND THE RECORD LACKS SUFFICIENT EVIDENCE TO MEET THE STANDARD

Harim asserts that the Board complied with the provisions of County Code § 115-111 even though it did not receive any input from the Sussex Conservation District ("Conservation District") and it failed to solicit input from the United States Environmental Protection Agency ("EPA"), the Delaware Division of Public Health ("Public Health"), and the Delaware Center for the Inland Bays ("DCIB"). AB at 20-23. Specifically, Harim alleges that: 1) consultation with DCIB was not necessary; "consultation with DNREC was sufficient"; 2) merely sending a letter to the Conservation District complies with the Code; and 3) the EPA has supposedly delegated its authority to DNREC. AB at 22. Harim fails to respond, however, to the Board's failure to solicit input from Public Health. Unfortunately for Harim, its three contentions are erroneous, and its failure to respond regarding Public Health is fatal.

A. Public Health Is An Agency Within The Statutory Purview, But It Was Ignored

For starters, it is uncontraverted that Public Health was not asked to comment. On that basis alone the Board erred. The legal standard was not met.

B. The Conservation District Provided No Input

The Conservation District did not comment. The Board had no evidence from it, despite the need for Conservation District input to satisfy the legal standard. The word "consult" means "to deliberate on: discuss" and "to take counsel to bring about." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 490. Radio silence is not a discussion – consultation never occurred. This omission is fatal to the validity of the Board's decision.

C. The DCIB Is A Private & Public "Agency" Which Was A Must To Consult With

Next, the DCIB is most certainly an "agency created for the promotion of the public health and safety" as required by County Code § 115-111. The term "agency" is not defined by statute. Thus, the Court should look to the dictionary definition for guidance as to the common and ordinary meaning of the statutory term. *Angstadt, supra.*

The term "agency" has at least three applicable definitions in the context of § 115-111: 1) "a person or thing through which power is exerted or an end is achieved"; 2) "an establishment engaged in doing business for another"; and 3) "a department or other administrative unit of a government." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 40. Thus, it is evident that the term "agency" means any private or public organization.

It should also be noted that Sussex County Council did not use the modifying words "governmental" or "public" so as to limit the meaning of the term "agency." Indeed, the statutory interpretation principle of *expressio unius est exclusio alterius* leads to the conclusion that the word "agency" was not intended to be limited to arms of the government. *See Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1060 (Del. 2011)(en Banc).

The DCIB is a non-profit organization formed and operated for the purposes of, *inter alia*, preserving, protecting, and enhancing Delaware's Inland Bays and their watershed. More importantly, the DCIB was created by Act of the General Assembly. 69 DEL. LAWS, c. 468 and 7 *Del. C.* § 7602. The 9 member DCIB Board of Directors includes the Secretary of DNREC, a Conservation District representative, and the Sussex County Administrator. 7 *Del. C.* § 7603. Its express purpose is "to oversee and facilitate the implementation of a long-term approach for the wise use and enhancement of the Inland Bays' Watershed." 7 *Del. C.* § 7602(a). The DCIB clearly constitutes an "agency."

The DCIB also satisfies the § 115-111 requirement that it be "created for the promotion of public health and safety" including the "protection of the County and its waterways from harmful effects of...water pollution of any type." The DCIB's *raison d'etre* is squarely within the bounds of the waterway protection field.

Accordingly, the DCIB was an agency that the Board was required to consult with, and its failure to do so requires reversal of the Board decision.

D. The EPA, Not DNREC, Is Involved With The Inland Bays Watershed; It Too Should Have Been Consulted

Further, the EPA is a governmental agency that was improperly excluded from the Board's scope of consultative inquiry. No evidence exists to support the proposition that any agencies other than the EPA and the DCIB were involved in the National Estuary Program and the 1995 Comprehensive Conservation And Management Plan For Delaware's Inland Bays.

No comments on the Harim project impacts on the Indian River watershed were made by DNREC since the National Estuary Program and 1995 Plan are creatures of the EPA and the DCIB alone. *See* 7 *Del. C.* Ch. 76 and A-556 to A-558. The glaring oversight committed by the Board in failing to consult with the EPA is therefore grounds for reversal.

E. Harim Did Not Satisfy Its Burden Of Proof On the § 115-111 Legal Standard

Finally, Harim fails to rebut the argument that there is a lack of record evidence regarding the subjects of the Harim Chicken Plant's effect on: 1) public health; and 2) the County's waterways. All Harim did was present DNREC statements regarding Harim's potential application for various and sundry types of permits. *See* A-52 and A-53.

Since County Code § 115-111 mandates that the Board reach out and obtain input regarding the impacts on waterways, it is evident that DNREC's *ipse dixit* does not suffice to satisfy the legal standard. Harim cannot point to any DNREC input regarding the types of pollution that could be caused by the Harim Chicken Plant and how permitting requisites will insure against pollution of the Indian River watershed. The Record is barren. No evidence cannot constitute substantial evidence.

Harim bore the burden of proof to provide the Board with substantial evidence demonstrating compliance with the applicable Special Use Exception standards. *Rollins Broadcasting of Delaware, Inc. v. Hollingsworth*, 248 A.2d 143, 145 (Del. 1968). Instead of presenting substantial evidence, however, the Record reflects that DNREC presented: 1) legal truism statements regarding the types of permits that might potentially be required for the Harim Chicken Plant; and 2) conclusory statements containing mere generalities.

No evidence was presented which provides any data, analysis, explanation, or details regarding how the Harim Chicken Plant will be developed so as not to pollute the adjacent waterways which are within the Indian River Watershed. As a result, the Record evidence is at best a scintilla; it fails to rise to the level of substantial evidence.

ARGUMENT

III. THE BOARD MADE ERRORS ON NOTICE AND HEARINGS, REQUIRING REVERSAL

Harim does not effectively rebut the fact that certain nearby property owners who were required to be notified did not receive the necessary written notification. This Court has previously held that violation of the notice requirements regarding a Special Use Exception application to the Board is grounds for reversal. *Sea Pines Village Condominium Ass'n of Owners v. Bd. of Adjustment*, 2010 WL 8250842, *6, Graves, J. (Del. Super., Oct. 28, 2010). The Court reasoned that because notice was required to be provided pursuant to the County Code and Board Rules, the 5th and 14th Amendments to the United States Constitution and Article I, § 7 of the Delaware Constitution were contravened if notice was lacking. *Id.* at *5. Since lack of written notice to nearby property owners has not been rebutted by Harim, reversal is warranted.

Notice was also defective regarding the 2nd and 3rd meetings held by the Board since they were required to be conducted as public hearings. Harim concedes that no further notice and advertisement requirements were complied with regarding the second and third Board hearings. AB at 32-34. The full panoply of notice and advertisement provisions was only complied with for the very first of the Board's three separate proceedings. *Id.* As a consequence, reversal is appropriate if public hearings were required.

Harim argues that the Board did not need to conduct a public hearing after it consulted with agencies. AB at 34. But the applicable County Code provisions set forth a procedure that logically requires a public hearing post-consultation. County Code §§ 115-109, 115-111, and 115-210 call for a public hearing and then a Board vote. Temporally, the Board consultation with "agencies" must occur prior to its vote. *Ergo*, such consultation must occur prior to, or contemporaneously with, the public hearing.

Rollins held that a special exception applicant must meet its burden "by substantial evidence, verbal or documentary, susceptible of cross-examination and rebuttal by opponents... ." Written submissions outside of the public hearing process are not sufficient to prove satisfaction of the legal standard; no cross-examination or rebuttal at a public hearing was possible.

The general public was foreclosed from providing rebuttal or cross-examination comments on: 1) the submissions made by DNREC; 2) the lack of solicitation of comments from the DCIB, the EPA, and Public Health; and 3) no response from the Conservation District. No Notice and Advertising occurred. And no public hearing was held. The Board denied the public its full opportunity to be heard.

CONCLUSION

Based upon the foregoing, Appellants Protect Our Indian River and three nearby property owners respectfully request that this Court reverse the Board Decision based upon procedural and substantive legal infirmities. For starters, the Board was not at liberty to render any decision since it lacked jurisdiction; no appeal or property owner was before it. In addition, the uncontraverted record evidence establishes that the Board merely rubberstamped the list of consultant agencies presented by Harim, rather than going the legally required route to solicit and obtain input from relevant agencies such as the Conservation District, the EPA, Public Health, and the Delaware Center for the Inland Bays. Lastly, the Board committed numerous procedural violations by failing to properly provide notice and conduct public hearings as required by law. Accordingly, the Court should reverse the Board's decision.

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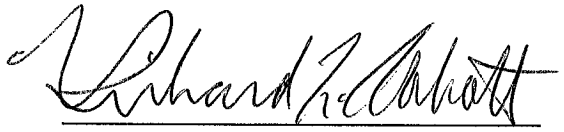

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